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IN THE

Supreme Court of the United States

No. 1035.

OLGA E. VOELLER, ET AL.,

Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

Our principal reason for filing a reply brief is that Professor Norman D. Lattin, of the Ohio State University College of Law, has recently published an article in the Michigan Law Review on the subject: "Reappraisal of Appraisal Statutes". In this article, Professor Lattin agrees with our contentions and disagrees with the decision of the Supreme Court of Ohio in the case of **Voeller v. Neilston Warehouse Company**, 136 O. S., 437.

We are filing with this reply brief nine (9) copies of that magazine with page references on the opening flyleaf and with the margin scored at the places which are applicable.

Our thought in filing these copies of the magazine is that the article and the way it is treated demonstrates the importance of the question involved and therefore the importance of the allowance of the writ of certiorari. In this case, the court that is final authority upon questions of due process under the Fourteenth Federal Amendment should be the Supreme Court of the United States and not the Supreme Court of Ohio.

We will only add that Professor Lattin, aside from being a teacher of corporation law of long standing and an author of a text book on corporation law and an author of articles published in legal periodicals, is a member of the corporation committee of the Ohio State Bar Association.

We note at page 2 of the respondents' brief as follows:

> "It is significant that there is not a single authority mentioned in the dissenting opinion on the constitutional point."

Opposing counsel apparently lose sight of the fact that the **majority** opinion of the Ohio Supreme Court **does not state a single authority on the constitutional question.**

At the bottom of page 3 and at the top of page 4 of respondents' brief, it is stated that the dissenting stockholders of the warehouse company could have filed an action within six months. Surely, the **statute** gives the corporation the same right for the same period. The **common law** gives to any **majority stockholder** the same right if the corporation neglects its duty. This **fair opportunity** takes away the force of the alleged "conclusive presumption".

Near the top of page 4, it is stated that the demands of the dissenters were exorbitant. This is entirely beside

the question. If the demands were exorbitant, the entire difficulty could have been obviated by a counter offer. If an answer to this charge is necessary, that answer is, that the record shows that the stock was worth one hundred dollars ($100.00) per share and that the majority, for purposes of their own, made a sale at a ruinous price.

At the bottom of page 4 of respondents' brief, it is declared that in stating that Section 8623-72 is separate and distinct from Section 8623-65, the Supreme Court of Ohio was merely construing Ohio statutes. This is very far from being an accurate statement. We again point out that Subsection 65 in its closing paragraph definitely states:

> "Dissenting shareholders, whether or not entitled to vote, shall be entitled to the relief in the manner and under the conditions hereinafter provided."

It follows that the declaration of the Ohio Supreme Court is not a matter of construction of statutes but it is a matter of substance and shows that the Supreme Court of Ohio failed to appreciate that the two statutes are tied together. It is not in any sense a local matter and it is not a matter of construction.

Respondents' brief cited the case of **United States v. Carver**, 260 U. S., 482, to the effect that a denial of certiorari does not import an expression of opinion upon the merits of the case. Our reply to this is that as the matter now stands the decision of the Ohio Supreme Court will be binding upon Ohio courts and a persuasive authority in the courts of other states. If it is unsound, it ought to be corrected before it becomes a finality. It could be cited in any case involving "conclusive presumptions" whether relating to appraisal statutes or what not.

In a broader sense, the question is important to every

corporation in every state of the union, because the law in Ohio should be the law in each of the forty-eight states; and it would be unfortunate if in any case where a dissenting shareholder becomes entitled to be paid the fair cash value for his shares, whether because of an amendment to the articles of incorporation, or because of a merger, or consolidation, or as in this case, because of a sale of substantially all the corporate assets, each dissenting shareholder must notify each and every of the majority shareholders of his demands, and, if it becomes necessary to file suit on such demands, make each and every such individual majority shareholder a party to the suit to the end that **"due process"** shall be had.

We think the decision of the Ohio Supreme Court is so essentially unsound that it ought to be reviewed by the highest authority on questions of due process as guaranteed by the Fourteenth Federal Amendment.

Respectfully submitted,

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